STATE OF SOUTH CAROLINA **COUNTY OF GREENVILLE**	**IN THE COURT OF COMMON PLEAS** **THIRTEENTH JUDICIAL CIRCUIT** **CA# 2019-CP-23-03305**
Blue Bridge Properties, LLC, Plaintiff, vs. 12 West Park Land Trust and Mary Bourquin, as Trustee, Defendants.	**ORDER**

This matter came on for trial before me on October 6, 2020. Plaintiff sued Defendants alleging that Defendants had breached a contract of sale concerning a vacant lot in the City of Greenville, South, located at 12 West Avenue, Greenville, SC. Plaintiff sought damages for the breach. Plaintiff also sued for specific performance.

Defendants timely answered the complaint which generally denied the allegations of the complaint and raised numerous defenses. Defendants also counterclaimed alleging the title to the property had been slandered by the *lis pendens* filed by Plaintiff. Defendants sought damages and attorney fees and costs.

Based on the testimony, evidence and the pleadings filed in this matter, I find as follows:

I. FINDINGS OF FACT

On August 27, 2018, a written contract of sale was signed for property owned by 12 West Park Land Trust and known as 12 W. Park Ave., Greenville, South Carolina. A copy of the contract was Exhibit A to Plaintiff's complaint.[1] The written contract is a document comprised of

[1] Plaintiff's Exhibit 1.

nine (9) pages, most of which is typewritten. The contract was signed on behalf of the Plaintiff by Jim Raptis who indicated his capacity as "member." The contract was signed by the Defendant, 12 West Park Land Trust by Mary Bourquin as trustee.

The testimony was that all of the handwriting on the written contract, including the check marks, had been inserted by a real estate agent, Jim Alef, with Access Realty. Both Mr. Raptis and Ms. Bourquin acknowledged having actually signed the original contract.[2]

The contract specified that the closing of the sales transaction was to have occurred no later than "5:00 PM on or before 11/9, 2018" The Plaintiff was given a seventy-five (75) day due diligence period. The contract was a cash sale and there were no contingencies.

On page 1 of the contract, in paragraph 1, is a series of definitions. Subparagraph (G) defines "Time" as "all time stated shall be South Carolina local time. **Time is of the essence with respect to all provisions of this contract stipulating time, deadline, or performance periods."** [Emphasis in original]

Mr. Raptis testified that he did not believe time was of the essence of the contract. When asked, Mr. Raptis could not recall when or if he actually read the entire contract. Specifically, he testified that he had been unaware of the "time is of the essence" clause until shortly before trial.[3]

Mr. Raptis was questioned about his authority to execute the contract on behalf of the Plaintiff. He testified that the LLC has two (2) members Mr. George Alexandrou and Silvia Chan, his wife. His wife was a member until February, 2019, when he took over her interest and became a member of the LLC when she disassociated as a member. He further testified that he

[2] Plaintiff's Exhibit 1 is a copy of the original contract. Neither party, nor the closing attorney, Mr. Adam Breaux, had the original.

[3] Paragraph 35 of the contract states, in bold type, "Parties acknowledge, receiving, reading, reviewing and understanding: this Contract… parties acknowledge having time and opportunity to review all documents and receive legal counsel from their attorneys prior to signing Contract." (The contract follows the pattern of capitalizing the first letter of words or phrases that are defined on the first page of the contract.)

signed the August 27, 2018 contract as a "member" of the Plaintiff LLC. However, in light of the ruling herein, the Court need not address that issue.

Both Mr. Raptis and Ms. Bourquin testified that they were familiar with and were experienced in real estate development. Mr. Raptis testified, at length, that Plaintiff had contracted to purchase the property because Plaintiff intended to construct three townhouses on it. I find, therefore, that both Plaintiff and Defendant were experienced in real estate development.

The Plaintiff contended that the reason the closing did not take place was because a small part of a neighboring property (owned by Holbert) had encroached on the property that was the subject of the contract. There is a single family dwelling on the adjacent lot. At some time, many years ago, a portion of the Holbert's brick walk and steps were constructed over the property boundary and onto the subject property. The encroachment was as much as three (3) feet in one area to as little as a few inches.

Plaintiff contended that the Holbert's encroachment was a title issue that had to be resolved before closing could take place. However, as Mr. Raptis testified, and as alleged in its complaint, Plaintiff wanted to build three (3) townhouses on the lot. During the due diligence period, Mr. Raptis discovered that the City of Greenville would only allow Plaintiff to build two (2) townhouses because Plaintiff needed to increase the size of the subject lot to 0.15 acres. In order to do that, Plaintiff needed to acquire 55.66 square feet additional property from the Holbert's.[4]

[4] Exhibit A attached to Defendants' Exhibit 7. Plaintifff's Complaint ¶¶10, 14

Plaintiff retained Mr. Adam Breaux, attorney at law, to close the transaction contemplated by the contract of sale.[5] Mr. Breaux testified, and I so find, that the encroachment issue could have been resolved by having the Holberts sign an affidavit that the Holberts were aware of the encroachment and would remove it if asked, a common way similar encroachment issues are handled. According to Mr. Breaux, it is also a process that can be done quickly.

Mr. Breaux also undertook, on behalf of the Defendants, to prepare the deed of conveyance required by the contract.

The sale contemplated by the contract did not close by November 9, 2018.

On January 1, 2019 an addendum was signed by the parties. The addendum did not recite any consideration to be paid to Defendant, 12 West Park Land Trust. The addendum extended the time for closing to February 28, 2019. The addendum stated: "This Addendum, upon its execution by both parties, is hereby made an integral part of the above referenced document [the contract at issue in this case]; the terms of said document, not affected by this Addendum, shall remain in full force and effect."

During this time, the parties continued to communicate concerning the sale of the property. Adam Breaux testified that the parties appeared to be cooperating and trying to get the transaction closed. In order to meet the development goal of Plaintiff, the Holberts sought to obtain a partial release from their mortgage company to be able to convey good title to the 55.66 square feet they had agreed to sell to satisfy the City of Greenville's lot size requirement so that three townhouses could be built on the lot instead of two. Getting the Holbert's mortgage lender's approval for the partial release of the mortgage is the reason Plaintiff chose not to go ahead and close on the contract.

[5] The contract defined the "Closing Attorney" as "the licensed South Carolina selected by Buyer to coordinate the transaction and Closing."

From the evidence adduced at trial, the Holberts appear to have fully cooperated with regard to the encroachment and agreed to sell the small portion of the needed additional property. On November 14, 2018, the Holberts emailed their lender asking for the mortgage to be partially released. On January 14, 2019, the Holberts signed a contract to sell the additional property and on January 25, 2019, they signed an easement agreement that resolved any issue concerning the encroachment. On January 31, 2019, the Holberts signed, at the request of their lender, a formal application for a partial release of their mortgage.

Mr. Alex Newton, who also testified, owned an LLC that was one of the beneficiaries of the Defendant trust. He communicated with Mr. Breaux through email about the closing. There is testimony and evidence in the record that on at least two occasions Mr. Newton corresponded with Mr. Breaux that Defendants wanted to proceed to close the sale transaction as contemplated by the contract.

For example, on January 8, 2019, Mr. Breaux sent an email to the realtor and Mr. Newton. His email said:

> I think there's been some confusion in regard to the transfer of the small piece of property [the Holbert's 55.66 square feet] and subsequent easement for use back to the Holberts. Both of these items are contingent on John (Blue Bridge) closing on the 12 W. Park property. We only need to file the deed and easement when that property closes. Do you know if the neighbor has been able to get in touch with their mortgage servicer regarding this? Please let me know if you (or they) have any questions.

The same day in an email response, Mr. Newton stated, in part:

> One small note, although we would like to have everything done simultaneously, the transfer of the smaller piece of property and the easement agreement are not contemplated as being contingent on the larger sale to Blue Bridge… I believe I'm correct in saying that everyone would like to close the larger sale to Blue Bridge immediately…"

The sale contemplated by the contract did not close by 5:00 PM on February 28, 2019.

A second addendum was signed by the parties. The second addendum recited no consideration to be paid to Defendant, 12 West Park Land Trust. The effect of this addendum was to extend the time for closing to April 30, 2019.[6]

Plaintiff, rather than closing, decided to wait on the Holbert's mortgage lender to agree to release its mortgage. During the second extension of time to close, the parties continued to work with the Holbert's lender to obtain consent for the partial release of mortgage. On March 10, 2019, almost two months before the second deadline to close, Mr. Newton emailed Mr. Breaux as follows:

> I had a couple of questions that I wanted to clear up, if you have a couple minutes. First, in the last group email, you asked Hayley [Holbert] if they would be willing to release the property now. It looks like she and her mom have already signed the deed/easement agreement, so I was a little confused by that. Were you referring to something additional, *such as going ahead and closing*?
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> Secondly, and perhaps this ties back into the first question, but do we need the lender to grant the partial mortgage release *before moving ahead with the closing*? The reason I ask is because Greenville County apparently needs your client to have .15 acres to build three townhomes on the property, but he doesn't need to use the additional, encumbered strip of land for construction. Would it be possible for your client to own the full .15 acres to meet the county's requirements (once the deed/easement agreement is filed) but move forward with construction on the unencumbered .149 acres of the current property while we wait on the Holberts' lender? *I only ask because I'm sure by now everyone is anxious to move forward with this, if possible.* [Emphasis added.]

By April 30, 2019, the Holbert's lender had not consented to the release of its mortgage and the sale contemplated by the contract did not close by 5:00 PM on April 30, 2019.

Defendants were presented with a third addendum. This third addendum was signed by the Plaintiff on April 25, 2019. It sought yet another extension of the time to close the contract,

[6] This addendum contained the same language as the first one to the effect that all other terms of the contract remained unaltered.

this time to November 1, 2019, and provided for the payment of an additional $6,000.00 to the Defendant trust. Defendants did not sign the addendum.

Plaintiff filed suit against the Defendants on June 10, 2019. Plaintiff also filed a *lis pendens* on the property on May 29, 2019. (*See* Greenville County Court of Common Pleas Case # 2019LP2300477)

II. CONCLUSIONS OF LAW

Plaintiff contends that Defendants repudiated the contract. Defendants contend that the second extension of the time to close the transaction expired and Plaintiffs, through no fault of Defendants, did not close. Therefore, the contract was no longer enforceable.

Plaintiff contends that a third addendum to extend the time for closing and to increase the purchase price was offered; however, Defendants did not sign it. (Complaint ¶ 31)

A. Breach of Contract.

Plaintiff alleges that there was a valid, enforceable, written contract for the sale of real estate that existed between the parties at the time the Defendants were alleged to have breached it. "The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). *Cited with approval*, *Branche Builders, Inc. v. Coggins*, 686 S.E.2d 200, 386 S.C. 43 (S.C. App. 2009).

The contract at issue in this case is clear and unambiguous that the closing had to occur no later than a specific time on a specific date. The two addendums that were signed also specified closing no later than a specific time on a specific date.

The contract states that it "expresses the entire agreement between the parties" and that "there is no other agreement, oral/otherwise, modifying [its] terms." It further states that the parties entered the contract "without reliance upon any statements, representations, inducements,

promises or agreements by Brokers or Parties except as expressly stipulated or set forth in this Contract."

The contract is clear that time was of the essence. It stated the date and time of day by which the closing had to occur. The two addendums that were signed stated the extended dates by which the contract had to close and made clear that all other terms of the contract, unaltered by the addendums, would remain in full force and effect.

Plaintiff contended that Mr. Newton continued to correspond with Mr. Breaux after the final, April 29, 2019, closing date. Plaintiff argues that this had the legal effect of extending the time to close in spite of the fact that Plaintiff signed a third addendum that admittedly was not signed by Defendants.

Plaintiff, in effect, asks this court to re-write the contract to include a third, unsigned addendum to extend the closing date. "[T]he parties have a right to make their own contract and it is not the function of this Court to rewrite it or torture the meaning of a policy to extend coverage never intended by the parties. The contract must be interpreted in the light of the whole agreement in such a way as to carry out the intentions of the parties." *Torrington Co. v. Aetna Cas. & Sur. Co.*, 216 S.E.2d 547, 264 S.C. 636 (S.C. 1975)

Courts in South Carolina do not re-write contracts. "MailSource invites our attention to the law of other jurisdictions where courts have extended the non-compete period following a breach to ensure the nonbreaching party receives the benefit of the bargain. We see no evidence this proposal was presented to the trial court for its consideration, nor do we find support for it in South Carolina law. We therefore decline to adopt this procedure as a matter of first impression, because to do so would essentially re-write the parties' contract, a service the courts of South Carolina do not perform." *Mailsource, LLC v. MA Bailey & Associates*, 356 S.C. 363, 588 S.E.2d 635 (S.C. App. 2003)

In this case, there was no enforceable contract requiring the Defendants to convey title to the property to Plaintiff because the contract time had expired.

Plaintiff relies heavily on the case of *Lowcountry v. Charleston Southern Univ*., 376 S.C. 399, 656 S.E.2d 775 (S.C. App. 2008) in support of its position. However, the Court of Appeals in *Lowcountry* stated that the contract for the sale of the land did not have a time is of the essence clause. Since the *Lowcountry* contract did not have such a clause and based on the unique facts of that case, the Court of Appeals found the existence of an enforceable contract and granted specific enforcement of it even though the closing did not occur within the contract time specified.

> We agree with the master that Buyer's failure to close on the projected closing date did not entitle the University to terminate the contract because time was not of the essence under the contract. It is well settled that time is not of the essence in a contract to convey land unless made so by its terms expressly or by implication. *Faulkner v. Millar*, 319 S.C. 216, 219, 460 S.E.2d 378, 380 (1995). "When the contract does not include a provision that `time is of the essence,' the law implies that it is to be done within a reasonable time." *Id*. Under the circumstances presented here, Buyer had a reasonable time to complete performance of the contract.

Lowcountry v. Charleston Southern Univ., 376 S.C. 399; 656 S.E.2d 775, 779 (S.C. App. 2008)

In this case, the contract sued upon, on the first page and in the first paragraph in bold, underlined letters, stated that **"Time is of the essence with respect to all provisions of this contract stipulating time, deadline, or performance periods."** The contract also defined "business day" as a "24 hour period" of Monday through Friday. It further stated that all time stated would be "South Carolina local time," emphasizing the importance of time with regard to the contract.

Defendants signed two written addendums that extended the time for closing. The Defendants chose not to sign the third addendum even though the addendum expressly included

the offer to pay Defendants the sum of $6,000.00, thereby increasing the sales price to $186,000.00. Defendants had the right not to sign the third extension.

The contract at issue in this case was clear and unambiguous that the closing had to occur no later than a specific time on a specific date. The two addendums that were signed also specified closing no later than a specific time on a specific date. Defendants are not in breach of the contract because after April 29, 2019, the contract was no longer enforceable. And, while there was some evidence of ongoing discussions about closing beyond the April 29, 2019 date, such do not rise to the level of *Lowcountry.*

B. Specific Performance.

Plaintiff has also claimed that it is entitled to proceed on a theory of specific performance. "In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract. [Citation omitted] The party seeking to compel specific performance 'must be able to perform at the exact time he requested specific performance, not some `reasonable time' in the future.' *Ingram v. Kasey's Associates,* 340 S.C. 98, 531 S.E.2d 287 (S.C. 2000); 340 S.C. at 106 n. 1, 531 S.E.2d at 291 n. 1." *Lowcountry v. Charleston Southern Univ*., 376 S.C. 399, 656 S.E.2d 775 (S.C. App. 2008)

"'The discretion to grant or refuse specific performance is a judicial discretion to be exercised in accordance with special rules of equity and with regard to the facts and circumstances of each case.' *Guignard v. Atkins,* 282 S.C. 61, 66, 317 S.E.2d 137, 140 (Ct.App.1984). A court may order specific performance if: (1) a valid contract exists between the parties; (2) no adequate remedy at law exists for the breach; (3) specific performance is equitable

between the parties; and (4) no fraud, accident, or mistake infects the contract." *King v. Oxford*, 282 S.C. 307, 314, 318 S.E.2d 125, 129 (Ct.App. 1984). "However, specific performance is not an absolute right, and a court granting it must follow established principles and carefully consider all the circumstances of the particular case." *Bishop v. Tolbert*, 249 S.C. 289, 298, 153 S.E.2d 912, 917 (1967).

Plaintiff's case fails because there was no longer an enforceable contract. The contract time for closing had expired and Plaintiff refused to close by imposing additional pre-conditions for closing that were not terms of the contract. "The agreement was properly executed and valid on its face, ***with no contingencies***." Complaint ¶12 [Emphasis added]

The contract upon which Plaintiff's case rests stated a definite time for the closing of the transaction to take place. In addition, time was of the essence of the contract.

Plaintiff had specific plans for developing the real property. Complaint, ¶¶ 9 & 10. To meet those plans, Plaintiff needed a certain amount of acreage. Plaintiff refused to close until the Holbert's lender had agreed to release the additional land from its mortgage. "Plaintiff is ready, willing and able to fully perform its obligations with regard to the purchase of the property, ***with clear title, and, or a release of the mortgage on the portion of the third party's lot for which an easement had been granted.***" Complaint ¶37 [Emphasis added] The acquisition of the additional land and its release from the Holbert's mortgage lender was not a term of the contract sued upon. Nevertheless, Plaintiff refused to close until that was accomplished. It was not accomplished by 5 o'clock PM on April 30, 2019.

C. Attorney Fees.

Plaintiff has pursued claims of breach of contract and for specific performance. In addition, Plaintiff filed a *lis pendens* to prohibit the Defendants from conveying title to the land during the pendency of the litigation.

In paragraph 27 of the contract Plaintiff sued upon, Plaintiff would be entitled to an award of "attorney fees and all other direct costs of litigation if Buyer prevails in any action against Seller." Plaintiff has not prevailed and is, therefore, not entitled to an award of attorney fees.

The Defendants were forced to defend the claims made against them, claims that were made based on the claim that the contract was not only enforceable at the time it was alleged to have been breached, but that it should be specifically enforced. The contract sued upon also provides that Defendants would be entitled to an award of "attorney fees and all other direct costs of litigation if **Seller prevails in any action against Buyer**." [Emphasis added] Defendants have prevailed and are, therefore, entitled to an award of attorney fees and the costs of this litigation.

> The general rule is that attorney's fees are not recoverable unless authorized by contract or statute. *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989); *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978); *Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961). When there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown. *Baron*, supra. "Where an attorney's services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by any competent evidence." Baron, 297 S.C. at 384, 377 S.E.2d 296 (emphasis added).
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> *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493; 427 S.E.2d 659, 660 (S.C. 1993)

Plaintiff contends that if the court finds that the contract at issue is unenforceable, the Defendant has no claim to attorney fees because the claim arises pursuant to an unenforceable contract. However, this Court's finding that the contract is unenforceable has nothing to do with whether or not the contract was a valid contract. The Court's finding has to do with the enforceability of the Defendants' covenant to consummate the sale of the property to the Plaintiff. That covenant is no longer enforceable because the time specified in the contract for its performance has expired. Put another way, Plaintiff sued Defendants for breach, and it is the

finding of this Court that no breach took place because the contract time had expired. And, the claims litigated arise out of the parties' contract.

In this case, neither party claimed that the August 27, 2018 contract was invalid or that it was not binding upon the parties according to its terms when it was executed. Rather the sole issue in dispute was whether the contract provision that required the Defendants to close on the transaction was enforceable after the contract time had expired.

The contract in this case contained a number of terms in addition to the time when closing had to occur. For example, it gave the Plaintiff a seventy five (75) day due diligence period. It stated that the contract was not contingent on re-zoning of the property or the Plaintiff's ability to obtain building permits. The contract gave the Plaintiff specified rights to close the transaction in the event that the Defendants were unable to perform as required by the contract. The contract also provided that the escrow agent had to hold the earnest money deposit and not disburse it except by written agreement of the parties or by court order. None of these contract terms were in dispute in this litigation.

The written contract memorialized mutual covenants that allowed either party to recover attorney fees and costs for claims arising out of the contract if the party prevailed in the litigation. That covenant remains enforceable even though the Defendants' covenant to sell the property does not. The contract also contained a mediation clause that required the parties to submit "any dispute, claim, breach or services [*sic*] issues related to this Contract… to mediation." Clearly that covenant remained enforceable even though this Court ultimately determined that the contract, insofar as it required the Defendants is consummate the sale transaction, is no longer enforceable. To find otherwise would, in effect, find that the Plaintiff "prevailed too thoroughly and cannot now recover her fees." *Id.*

Plaintiff chose to file a lawsuit alleging a cause of action for the breach of a written contract and to require its specific performance. Plaintiff has not prevailed, but Defendants have. Therefore, the provision in the contract with regard to an award of attorney fees and costs remains enforceable.

Defendants submitted the affidavit of Defendants' attorney to support her claim for attorney fees and costs. Mary Bourquin, Trustee, testified that she had reviewed the affidavit and that the services reflected therein were rendered to Defendants in the course of this litigation. The Court finds that the fees are reasonable, reflect the fees charged by attorneys of similar standing to Defendants' counsel, and were rendered in the course of this litigation. See, *Blumberg v. Nealco* 427 S.E. 2d 659 (S.C. 1993). Therefore, Defendants are entitled to an award of attorney fees and costs as stated in Defendants' counsel's affidavit.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, as follows:

1. The Plaintiff's causes of action for breach of contract and specific performance are hereby dismissed;

2. Access Realty is hereby directed to distribute the $3,000.00 earnest money deposit to the Defendants pursuant to the terms of paragraph 5 of the contract;

3. The Defendants are hereby awarded attorney fees and costs from the Plaintiff in the amount of $13,505.25; (no other relief is sought by Defendants) with said judgment to be entered against Plaintiff, and

4. The Clerk of Court for Greenville County is hereby directed to cancel the *lis pendens* filed in this matter found at Case # 2019LP2300477.

AND, IT IS SO ORDERED.

JUDGE'S ELECTRONIC SIGNATURE PAGE TO FOLLOW

Greenville Common Pleas

Case Caption: Blue Bridge Properties LLC vs. 12 West Park Land Trust , defendant, et al

Case Number: 2019CP2303305

Type: Master/Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)